

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

June 20, 2008

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In the Matter of  
Lisa Nguyen

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Docket No. WET-2008-031  
DEP File No. 59-1144  
Quincy

**RECOMMENDED FINAL DECISION**

This matter is an appeal of a Superseding Order of Conditions (“SOC”) issued under the Wetlands Protection Act, M.G.L. c. 131, § 40 (the “Act”) and 310 CMR 10.00 et seq. (the “Wetlands Regulations”) by the Northeast Regional Office of the Department of Environmental Protection (“MassDEP” or “the Department”). On March 19, 2008, the Office of Appeals and Dispute Resolution (“OADR”) of the Department received this appeal by Anita Cerro (“the Petitioner”), concerning the SOC issued to Lisa Nguyen (“the Applicant”) for performance of certain work at the Applicant’s residence at 11 The Strand, Quincy, Massachusetts (“the Property”). The Quincy Conservation Commission is also a party to this appeal (“the Commission”).



On April 28, 2008, I conducted a Pre-Screening Conference in this appeal in accordance with 310 CMR 1.01(5)(a)15 and 310 CMR 10.05(7)(j)7.a, pursuant to a Scheduling Order that was issued to the parties on April 7, 2008.<sup>1</sup> The purpose of the Pre-Screening Conference was to determine the appeal's potential amenability to settlement through alternative dispute resolution or other means, and to identify the issues for resolution in this appeal. Scheduling Order, ¶ 3.

At the Pre-Screening Conference, it became apparent to me that there was very little factual basis for Petitioner's appeal of the SOC. In addition, the basis for standing for the Petitioner was unclear. As a result, I issued an Order for a More Definite Statement and to Show Cause directing the Petitioner to demonstrate why her appeal should not be dismissed. The Petitioner thereafter filed a response to my Order and her entire Direct Case under 310 CMR 10.05(7)(j)3.b. In her papers, the Petitioner raised a new allegation against the Commission and the Department: their purported failure in prior permit proceedings to provide accommodations for her alleged disability in violation of the requirements of the Americans with Disabilities Act, 42 U.S.C. §12132 ("ADA").

Although the ADA allegation was late and could have been barred due to failure to raise this issue by the date of the Pre-Screening Conference, because of the seriousness of the issue, I ordered the Department and the Commission to respond to the allegation. In that order, among other things, I directed the parties to brief the issue of whether this forum, the Office of Appeals and Dispute Resolution ("OADR"), would have jurisdiction to address a claim under the ADA.

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<sup>1</sup> Under 310 CMR 1.01(5)(a)15, the authority of Presiding Officers to prescreen appeals includes the power to conduct prescreening conferences with the parties to an appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." Presiding Officers are also authorized to conduct simplified hearings of appeals in accordance with 310 CMR 1.01(8)(a), and issue recommended final decisions for dismissals of appeals. 310 CMR 1.01(5)(a)15.

The Department and Commission filed responses. The Department also filed a motion to dismiss and/or for directed decision. The Petitioner has filed a response to those motions along with a motion to strike the Department's motion to dismiss.

**I. Ruling on Jurisdiction over ADA allegation and Petitioner's Motion to Strike**

**A. Facts Relevant to ADA Claim**

The Petitioner alleges by affidavit discrimination under the ADA. As to the Department, the Petitioner alleges, among other things, that: (1) Department staff failed to return her phone calls (implied discrimination claim); (2) the Department failed to provide requested accommodation for her attendance at a site visit; and that (3) "the issuance of the SOC under these circumstances implicated and violated the ADA." See, Petitioner's Response, p. 6. As to the Commission, the Petitioner alleges, among other things, that: (1) the Commission agent failed to present her written objections at the hearing and Petitioner could not present them in person due to her disability; and (2) Petitioner has been refused copies of minutes and decisions concerning the project at issue (implied discrimination claim). See, Petitioner's Response, p. 3.

The Department and Commission contend that the Presiding Officer in this adjudicatory proceeding, in which a Petitioner challenges the terms of a permit issued pursuant to the Wetlands Protection Act and Wetlands Regulations, does not have jurisdiction to adjudicate a claim by the Petitioner that her ADA rights were violated. For the reasons set forth below, I agree with the Department and the Commission.

**B. Legal Conclusions Regarding ADA Allegation**

Petitioner did not provide any legal citations in her amended statement of claim in response to the April 28, 2008 Order for a More Definite Statement and to Show Cause although some were provided in the motion to strike. The Department filed a response, which included a

legal analysis of the ADA and the extent of jurisdiction of this forum both under the ADA and the regulations governing this proceeding. The Department also supplemented its response with affidavits from two staff members of the Department's Northeast Regional Office who dealt with Petitioner prior to the SOC's issuance. As discussed below, at pp. 7-9, the affidavits from the two Department staff members demonstrate that the Department treated the Petitioner fairly in terms of the requirements for process and the opportunities to be heard in prior permit proceedings.

On the ADA jurisdiction issue, I conclude that I do not have jurisdiction to hear or consider the Petitioner's allegation of violations of the ADA in this proceeding because the ADA provides for a federal regulatory scheme that is administered by the federal, not the state government. The ADA is a statute with the purpose of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities. 42 U.S.C. §12101(a)(8) (2000). In the relevant portion of the ADA, Title II, the statute requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

As to enforcement of the ADA requirements, the statute itself provides only for federal enforcement by the U.S. Department of Justice or by private lawsuit in the federal courts. See, Title II. The Petitioner has cited no portion of the ADA statute or other applicable law that would enable a presiding officer in an adjudicatory proceeding regarding a permitting decision of the agency to consider and adjudicate claims that the ADA was violated. The wetlands and adjudicatory hearing regulations that vest jurisdiction over challenges to wetlands permitting

decisions in this forum also very specifically limit jurisdiction to issues arising under the Wetlands Protection Act and the Wetlands Regulations.<sup>2</sup>

Petitioner's reliance on three Massachusetts appellate court decisions addressing ADA issues do not bolster her position because the cases are inapposite to this one. All of these cases deal with the jurisdiction of the state courts to hear ADA claims. Courts have far broader jurisdiction to hear claims than this tribunal. While these cases show that the state courts may have some jurisdiction to consider ADA claims, the cases say nothing about the extent of jurisdiction of a presiding officer in a state agency permit adjudicatory hearing such as this case.

## **II. Issues of Fairness**

### **A. Background and Facts Regarding Fairness Issues**

Although this forum lacks jurisdiction to adjudicate an ADA claim, the adjudicatory hearing rules governing this proceeding do afford certain rights to notice and certain opportunities to be heard to participants in wetlands permit proceedings before local conservation commissions and the Department. Under the Wetlands Regulations, there is a provision for a public hearing and opportunity for submission of written comments by participants prior to the close of the public hearing in conservation commission proceedings. 310 CMR 10.05(5) and 10.05(7)(j)2.a (providing that previous participation by parties at conservation commissions must consist of submission of written comments prior to the close of the public hearing at a minimum). In SOC proceedings, certain participants in the local conservation commission proceedings, including abutters such as the Petitioner, may request

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<sup>2</sup> In 310 CMR 10.05(7)(j)2.b.v, the Petitioner is directed to state claims only as to "alleged errors contained in the Reviewable Decision (including an SOC) and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, §40, including reference to the statutory or regulatory provisions the Party alleges have been violation by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision."

action by the Department to issue a superseding order, just as the Petitioner has done here. 310 CMR 10.05(7)(a). The Department is obliged to notify the appealing party in writing if it needs additional information. 310 CMR 10.05(7)(g). The Department may, but does not have to, conduct an informal meeting or site inspection. 310 CMR 10.05(7)(i). If the Department decides to conduct a site inspection, then the Department must invite all parties to the SOC proceeding “in order to present any information necessary or useful to a proper and complete review of the proposed activity and its effects upon the interests identified in M.G.L. c. 131, §40 [the Wetlands Protection Act].” Id.

Petitioner contends in her affidavit that neither the Commission nor the Department treated her fairly. As to the Commission, Petitioner alleges, among other things, that: (1) the Commission’s agent failed to present her written objections at the hearing and Petitioner could not present them in person due to her disability; and (2) Petitioner has been refused copies of minutes and decisions concerning the project at issue (implication of discrimination claim). See, Petitioner’s Response, p. 3. As to the Department, Petitioner alleges, among other things, that: (1) Department staff failed to return her phone calls; (2) the Department failed to provide requested accommodation for her attendance at a site visit; and that (3) “the issuance of the SOC under these circumstances implicated and violated the ADA.” See, Petitioner’s Response, p. 6.

In response to the Petitioner’s allegations, the Commission has submitted an affidavit from its agent, Heather Sargent (“Ms. Sargent”). Ms. Sargent testified in her affidavit that she spoke to Petitioner many times prior to the Commission’s public hearing on the Applicant’s Notice of Intent (“NOI”). Petitioner was aware of the date of the public hearing on October 17, 2007 and could not attend. Ms. Sargent offered to present any written comments that Petitioner might have at the public hearing if Petitioner could send them prior to the public hearing. Ms.

Sargent testified that she did not receive any written comments from Petitioner prior to the public hearing, but that she informed the Commission at the public hearing of Petitioner's objection to the project. See, Affidavit of Heather Sargent, ¶¶ 5-11. Ms Sargent also testified that all documents requested by Petitioner, including the local order decision, were sent to Petitioner by certified mail, return receipt requested. Petitioner signed a receipt for the local order decision. The second mailing of the documents requested by Petitioner was returned by the Post Office as "Unclaimed." See, Sargent Affidavit, ¶¶ 13-16.

As to conduct by the Department, the Department has submitted the affidavits of Mr. Gary Bogue, who was the assigned project manager for this case, and Eric Worrall, the Deputy Regional Director in charge of the Wetlands Program in the Northeast Regional Office. Both agree that they spoke with Petitioner. Mr. Worrall testified in his affidavit that he had a one-hour telephone conversation with Petitioner on Monday, December 17, 2007, during which he listened to her concerns about flooding and impact to a nearby salt marsh. See, Affidavit of Eric Worrall, ¶ 5. Mr. Worrall also testified that Petitioner identified herself as a person with disabilities who would have trouble attending the site inspection -- which was scheduled for that week -- due to the cold weather and large accumulations of ice and snow that were present at that time. See, Worrall Affidavit, ¶ 6. Mr. Worrall further testified that he agreed to reschedule the planned site visit for another date to accommodate her concerns about snow, ice and cold temperatures. See, Worrall Affidavit, ¶ 7. Mr. Worrall responded to a request by the Petitioner that she be able to sit in a car provided by the Department at the site, that this was not legally possible due to liability issues. See, Worrall Affidavit, ¶ 8. As an alternative, Mr. Worrall testified that he offered other options to accommodate her concerns, including: (1) inspection of the site with a conference at Petitioner's front door (directly abutting the Property) to report and hear her

concerns, and (2) re-inspection of the site after hearing any further concerns. See, Worrall Affidavit, ¶ 9. After this telephone conversation, Mr. Worrall testified that he instructed the project manager, Mr. Bogue, to contact the Petitioner and told him what he had discussed with the Petitioner. See, Worrall Affidavit, ¶ 12.

Mr. Bogue admitted in his affidavit that he did not immediately call back Petitioner the date that she first called due to workloads and work schedule. See, Affidavit of Gary Bogue, ¶¶ 5-10. After receiving instruction from his supervisor, Mr. Worrall, Mr. Bogue called Petitioner to reschedule and plan for a new site inspection to accommodate her concerns about the cold temperatures, snow and ice. See, Bogue Affidavit, ¶¶ 11-16. Mr. Bogue testified that he confirmed with Petitioner that she would not be allowed to sit in his car. Petitioner then asked if she could participate via calling to Mr. Bogue's cell phone, to which Mr. Bogue agreed. See, Bogue Affidavit, ¶¶ 17-18. Mr. Bogue testified that he also listened at length to Petitioner's specific concerns about flooding and impacts to a salt marsh nearby. See, Bogue Affidavit, ¶ 19. Mr. Bogue testified that the date of the site visit on January 9, 2008 at 11 a.m., the date and time of the re-scheduled site inspection, was unseasonably warm day in the low to mid 50s with no snow or ice accumulations. See, Bogue Affidavit, ¶ 20. Mr. Bogue further testified that, to his surprise, Petitioner emerged from her house abutting the site at about 11 a.m. and got into a waiting taxicab. See, Bogue Affidavit, ¶ 21. When Mr. Bogue approached Petitioner to inquire if she was Ms. Anita Cerro and if she would be joining the site visit, Petitioner said she was Ms. Cerro but that she was not attending the site visit and had a doctor's appointment. See, Bogue Affidavit, ¶ 23. Mr. Bogue testified that Petitioner had never requested a further change in the site inspection date due to a conflict with a needed doctor's appointment. See, Bogue Affidavit, ¶¶ 25-26. Mr. Bogue proceeded with the site inspection and found no basis for an increased



flooding from the Applicant's proposed project as conditioned by the Commission, which findings were confirmed by supervisory review within the Department. See, Bogue Affidavit, ¶¶ 27-34.

I find the affidavits of the Commission's agent and the Departmental staff to be specific and credible. I find the Commission agent's testimony to be corroborated by the postal records. I find that the Commission accorded all process, notice and opportunities to the Petitioner that were required under the Wetlands Protection Act and the Wetlands Regulations. I also find the Department accorded all process, notice and opportunity to Petitioner to which she was entitled under these laws. In fact, the Commission and the Department gave Petitioner more time and opportunity to be heard than required. Petitioner, by her own testimony, admits that she neither attended the Commission's hearing on the Applicant's NOI or the site inspection, despite the opportunity to do so. Petitioner could also have sent timely comments to the Commission, but did not do so. Petitioner could have attended the site inspection either via cell phone or with accommodations, but she chose not to attend. I also do not find Petitioner's allegations and testimony credible due to the fact that these allegations were only made after the validity of Petitioner's appeal claims and the Petitioner's status as a participant in the process was questioned at the Pre-Screening Conference and by Order. For all these reasons, I conclude that Petitioner should not be allowed to add a second issue to this adjudicatory hearing, namely whether she was treated fairly and accorded all process and opportunity due to her under the Wetlands Protection Act and Wetlands Regulations.

### **III. Ruling on Grounds for Dismissal of Case**

Because I conclude that Petitioner should not be allowed to add a new issue to this adjudicatory hearing, I now return to the one issue before me in this matter:

Whether the Superseding Order of Conditions is consistent with the terms of the Wetlands Regulations at 310 CMR 10.24 to protect the interests of the Wetlands Act for Land Subject to Coastal Storm Flowage, as defined in 310 CMR 10.04?

This was the one issue agreed upon by all parties at the Pre-Screening Conference that was held on April 15, 2008. The Department has filed a Motion to Dismiss or alternatively a Motion for a Directed Decision as to this issue.

**A. Findings of Fact Relevant to Dismissal or Directed Decision**

There is no dispute about the scope and nature of the project, or that the project is accurately represented in the NOI including project plans. Copies of the NOI, project plans, and the SOC itself as well as the surveyed plans for the project and photographs of the site were placed into the record by the parties either at the Pre-Screening Conference or through their testimony and affidavits. The Applicant has been approved to install two very small decks with stairs to allow for safe entry into her home through the front and rear doors. There is currently no stair at all allowing entry to the front door, and there is a 10-foot drop from that door to the ground. The rear stair and deck is in very poor repair and has had to be propped up with timbers. The Applicant was also approved to add a small bathroom at the side of the house. All structures are to be constructed on sono-tubes with 6 inches of gravel underlying all structures. The footprint of all structures will be, therefore, extremely minimal, consisting of the combined diameters of all of the sono-tubes. In contrast, the Commission, and the Department by affirmation in the SOC, required the installation of a large area of gravel to enhance drainage under the entire square footage of the two decks and the bathroom addition, which would achieve 100% compensatory storage for runoff from the structures. See, NOI and project plans.

There is also no dispute that the Petitioner participated sufficiently to meet the standards of the Wetlands Regulations for standing at both the Conservation Commission order of

conditions proceedings and Department SOC proceedings. Petitioner has put into the record through her affidavit and prefiled testimony extensive written submissions to both the Commission and the Department about the history of flooding and storm damage in the area and her specific concerns about her property.

There is no dispute that the project Property is located in an AE flood zone and within Land Subject to Coastal Storm Flowage (“LSCSF”). The Applicant’s Property and the Petitioner’s abutting property are directly across a road from Quincy Bay. The Petitioner testified and no party disputes that there has been a history of coastal storms and flooding from such storms onto Petitioner’s and Applicant’s property for some time. Land Subject to Coastal Storm Flowage is a wetlands resource area for which no presumption of significance is stated and for which no performance standards are defined in the Wetlands Regulations. 310 CMR 10.24(1) provides as follows:

If the issuing authority determines that a resource area is significant to an interest identified in M.G.L. c. 131, §40 for which no presumption is stated in the Preamble to the applicable section, the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests.

In this case, the Department did make findings that the LSCSF was significant to protect against flood control and storm damage, among other things. See, SOC.

Petitioner lodged lengthy complaints with the Department about her flooding concerns. See, Affidavit of Worrall, ¶ 5; Bogue Affidavit, ¶¶ 19-20, 27. Petitioner repeated these concerns in her sworn prefiled testimony of a long history of flooding of her property. She described frequent flooding events severe enough to flood her basement and extinguish her pilot light for her heating system. See, Prefiled Testimony of Anita Cerro, ¶¶ 5 –8. The Petitioner contends that these flooding events have had serious consequences and pose significant risks to her due to her health and disability issues. See, Prefiled Testimony of Anita Cerro, ¶¶ 9-11.

The Department investigated this history of flooding prior to making a decision on the Applicant's pending SOC request. The Department researched the status of the Property as an AE flood zone and the history of flooding in the area. The Department specifically found that:

This [historical] flooding is caused by tidal/storm surges flowing into Black Creek according to the revised (May 16, 2006) Flood Insurance Study for the City of Quincy. It is the opinion of MassDEP that the proposed construction will not increase the potential for flood damage to your property.

See, SOC. Therefore, it is clear from the face of the SOC that the Department did consider the Petitioner's concerns about flooding from coastal storms. This is also confirmed by the testimony of Mr. Bogue, who took the flooding concerns of Petitioner into account during his site inspection. See, Bogue Affidavit, ¶ 27.

The Applicant had a set of plans prepared as part of the local proceedings before the Commission. These plans were also admitted to the record without objection from the Petitioner at the Pre-Screening Conference. There is one construction plan prepared by a Registered Professional Engineer showing the limited scope of the proposed construction and its elevation on sono-tubes. The Commission's Order of Conditions is also in the record and it requires "100% compensatory storage for flood storage lost" by placement of crushed stone areas around each sono-tube and beneath the footprint of the decks and bathroom addition. The Applicant also prepared and submitted a topographical plan of the project area, which includes the adjacent portion of Petitioner's property, which shows a very flat slope of Applicant's property towards the street, namely The Strand, not towards Petitioner's property. Applicant also submitted numerous photographs of the area that confirm the topography and show a small, vegetated strip that forms a small hummock barrier to Petitioner's property along Applicant's driveway.

**B. Legal Conclusions as to Dismissal**

The only resource area at issue in this matter is Land Subject to Coastal Storm Flowage (“LSCSF”). Land subject to coastal storm flowage is land that is subject to inundation caused by coastal storms up to the 100-year storm or storm of record. See, 310 CMR 10.04. This resource area has no stated performance standards in the regulations, but it has been determined in previous decisions to serve the interests of storm damage prevention and flood control. See *Matter of Longo*, Docket No. 91-001, Final Decision, 3 DEPR 24, 27 (February 7, 1996); *Matter of Whorisky*, Docket No. 85-1, Final Decision, 6 MELR 1143, 1157 (March 8, 1988). The extent of land subject to coastal storm flowage can generally be determined from coastal floodplain maps prepared for the Federal Emergency Management Agency (“FEMA”). The Department did find the LSCSF in this case to be important to the interest of flood control, and the Department did investigate its extent and history from FEMA maps and historical records.

Under the provisions of the Wetlands Regulations at 310 CMR 10.05(7)(j)2.a, various listed persons may file a notice of claim to challenge the issuance of a SOC with respect to LSCSF, as well as other resource areas protected by the Wetlands Protection Act. This list of persons with standing to appeal no longer includes abutters to the property that is the subject of an SOC.<sup>3</sup> The only category of persons with standing to appeal that appears to apply to the Petitioner here is the category of “aggrieved person.”<sup>4</sup> An “aggrieved person” must show previous participation in permit proceedings that were the subject of the notice of claim. See,

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<sup>3</sup> Even under the prior version of 310 CMR 10.05(7)(j), abutters also needed to demonstrate sufficient previous participation in permit proceedings to achieve standing to file a notice of claim challenging a final decision of the Department under the Act.

<sup>4</sup> The other parties with standing to file a notice of claim challenging an SOC are: (1) the applicant; (2) a landowner (the owner of record of the land or an interest in the land that is the subject of the SOC); (3) the local conservation commission or (4) a group of ten residents of the municipality in which the land is located, if at least one resident was a previous participant in permit proceedings.

310 CMR 10.05(7)(j)2.a. An “aggrieved person” is defined by the Wetlands Regulations as “any person who, because of an act or failure to act by the [Department in issuing the SOC], may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, §40.” See, 310 CMR 10.04.

An “aggrieved person” must include the following information in the notice of claim or risk dismissal of her filing for failure to file a complete appeal in a timely manner. See, 310 CMR 10.05(7)(j)2.b [“An Appeal Notice that does not contain all of the information required in [this section] may be dismissed.”] Section 10.05(7)(j)2.b requires that an “aggrieved person” include the following information in her notice of claim, among other things:

- ii. if filed by an aggrieved person, demonstration of participation in previous [permit] proceedings,... and sufficient written facts to demonstrate status as a person aggrieved;
- \* \* \*
- v. a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, §40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC];

Because it was unclear from the notice of claim whether Petitioner participated in her prior appeal of the local order of conditions, I asked her to produce evidence of such participation in the Order to Show Cause. Petitioner has satisfied this requirement, and the Department stipulated that Petitioner did participate to the extent required by the Wetlands Regulations.

In addition, I asked the Petitioner to substantiate her general allegation of aggrievement due to flooding in accordance with the Wetlands Regulations cited above. Petitioner has filed an affidavit in response to the Order and also has filed her Prefiled Testimony in accordance with the schedule for filing her Direct Case in the April 15, 2008 Post Conference Report and Order.

Copies of the NOI, project plans, and the SOC itself as well as the surveyed plans for the project and photographs of the site were already in the record. Petitioner bore the burden of going forward under 310 CMR 10.03(2) to raise some credible evidence of aggrievement and to support her allegations of flooding prior to the filing of her Direct Case. An allegation of abstract, conjectural, or hypothetical injury is not sufficient to demonstrate aggrievement.

*Matter of Charles Doe*, Docket No. 97-097, Final Decision (April 15, 1998). Petitioner must demonstrate that Applicant's project, as conditioned by the Department, would – or even could – generate identifiable impacts on the Petitioner's property. See *Matter of Lepore*, Docket No. 2003-092 and 2003-093, Recommended Final Decision (September 2, 2004); *Matter of Whouley*, Docket No. 99-087, Final Decision (May 16, 2000). See, *Matter of Kittansett Club*, Docket No. WET-2007-009, Recommended Final Decision (April 10, 2008), adopted by Final Decision (April 16, 2008) (Appeal dismissed where Petitioner could not demonstrate any flooding impact to abutting property because it was not downgradient from project site).

In addition, Petitioner has failed to carry her burden of going forward to establish some credible evidence that her property would be specifically injured. The topography maps of the parcel included in the NOI demonstrate an extremely flat incline that slopes generally toward the street. See, NOI and project plans. Photographs submitted at the Pre-Screening Conference show a very flat driveway with a vegetative barrier between Petitioner's property and Applicant's property. See, photographs submitted by Applicant and Petitioner. The record, therefore, indicates that sheet flow from Applicant's property would enter the street, not Petitioner's property. Petitioner did not submit any expert or other testimony of any kind that might have addressed a causal relationship between Applicant's project, as conditioned, and an

increase in flooding of her property. Without a showing of injury, Petitioner cannot establish standing to request an adjudicatory hearing.

Standing is jurisdictional and may be raised at any time by the Presiding Officer. *Matter of Gallagher Group*, Docket No. 2003-019, Recommended Final Decision (May 2, 2005). Abutters no longer receive special status under the Wetlands Regulations and must make a showing of aggrievement. The Wetlands Regulations were quite explicitly amended effective October 31, 2008 to remove the presumptive right of abutters to appeal without a showing of aggrievement. See, 310 CMR 10.05(7)(j) prior and after amendment. The Wetlands Protection Act, M.G.L. c. 131, §40, does not confer the right to an adjudicatory hearing upon abutters. It was through the issuance of the Wetlands Regulations that the Department identified those persons with standing to request an adjudicatory hearing pursuant to M.G.L. c. 30A. The validity of a similar MassDEP regulatory structure for establishment of standing has been recognized as valid by the Massachusetts Appeals Court. See, *Higgins v. Dept. of Environmental Protection*, 64 Mass. App. Ct. 754; 835 N.E.2d 610; 2005 Mass. App. LEXIS 961 (October 13, 2005) (Department's Commissioner and administrative hearing officer did not err in rejecting claims of abutter's location as conferring standing under regulatory language implementing M.G.L. c. 91 waterways licensing authority: "Abutters do not receive special status for purposes of standing under the regulations. Rather, for persons in the circumstances of the plaintiffs, standing depends on whether they are persons aggrieved as defined in 310 Code Mass. Regs. 9.02 and 9.17(1)(b), quoted above *In the Matter of Lipkin*, 2 DEP Rep. 249, 250 (1995)").<sup>5</sup>

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<sup>5</sup> The regulatory language in 310 CMR 9.00 et seq., the implementing regulations for the M.G.L. c. 91 waterways licensing program of the Department reads as follows: "Aggrieved Person means any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by [G. L.] c. 91 and c. 21A." See, 310 CMR 9.02. This language is nearly identical to the definition of an aggrieved person quoted earlier in this decision in the current Wetlands Regulations at 310 CMR 10.04.



In addition, the Petitioner has failed to submit any evidence that there is credible a risk of flooding from any activity on the Applicant's property. Petitioner has submitted no evidence to counter that of the Department and Applicant that the compensatory flood storage required would not be more than adequate. Petitioner has failed to allege any specific errors in the Department's SOC that would relate to her flooding concerns. Conditions in the permit appear to have more than addressed the Applicant's concerns about flooding by requiring extensive drainage improvements to compensate for the impact from the actual footprint of the project. Most of the evidence on which Petitioner relies is her own opinion testimony that flooding will be increased by Applicant's project. For this opinion testimony to qualify as evidence from a competent source supporting Petitioner's direct case, it must be testimony from a witness "shown to have special knowledge establishing expertise." *See, Matter of James S. Whitney*, Docket No. 2006-098, DALA Docket No. DEP-06-936, Recommended Final Decision (November 16, 2007), adopted by Final Decision (February 21, 2008); *Matter of City of Cambridge Dep't of Public Works*, Docket No. DEP-05-805, Recommended Final Decision, 14 DEPR 38, 43 (Mar. 12, 2007), Final Decision issued on other grounds (June 1, 2007), reconsideration denied (Oct. 16, 2007). Opinion testimony in a direct case must also be based upon an identified factual foundation--for example, field observations, calculations, measurements, or other data--and cannot rest upon mere speculation. *Id.* In addition, because "[a] direct case must be self-sustaining to survive a challenge to its sufficiency," *Matter of City of Cambridge Dept. of Public Works*, 14 DEPR at 43, "the factual predicate for opinion testimony supporting the direct case must appear in the testimony itself," and it is not enough, therefore, that cross-examination or redirect examination might reveal what that factual predicate is. *Id.*; *see also, Matter of Whitney, supra.*

I conclude that Petitioner is not a competent witness to testify as to whether this project would increase flooding and how flood waters would flow in the project area, because she has demonstrated no technical or other special expertise relevant to flooding. Petitioner has not testified to any measurements, data or other reliable factual foundation for her opinion. I accept Petitioner's testimony as true that flooding in the past has been quite serious; however, that is not the issue. The issue is whether the Applicant's project, as conditioned, will increase that flooding and cause injury to Petitioner's property. I conclude that the Petitioner has failed to carry her burden of going forward to show some credible evidence from a competent source that there would be any increase in flooding at all. Therefore, Petitioner has failed to establish that she would be aggrieved by this project.

#### **IV. Ruling Regarding Directed Decision**

Alternatively, for all the reasons stated above, Petitioner has failed to meet her burden of proof that the project, as conditioned by the Department, would increase flooding and that she would be injured by such flooding. Petitioner does carry the full burden of proof in this proceeding. 310 CMR 10.05(7)(j)4.b. The Petitioner "must establish in its Direct Case both the legal and factual basis for its position on the issues identified by the Presiding Officer in the pre-screening report." 310 CMR 10.05(7)(j)4.c. "Failure to do so will result in a waiver of Petitioner's Direct Case for that issue." *Id.* In addition, Petitioner must introduce in her Direct Case filing "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan (s) or photograph(s)." 310 CMR 10.05(7)(j)4.c(ii). Dismissal for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case -- generally, the testimony and exhibits comprising its prefiled direct testimony -- presents no evidence from a credible source in support of its position on the

identified issues. *Matter of James S. Whitney*, Docket No. 2006-098, DALA Docket No. DEP-06-936, Recommended Final Decision (November 16, 2007), adopted by Final Decision (February 21, 2008); *Matter of Bryan*, Docket No. DEP-04-767, Recommended Final Decision, 12 DEPR 120, 121 (July 25, 2005), adopted by Final Decision (Sept. 23, 2005); *Matter of Cheney*, Docket No. 98-096, Final Decision, 6 DEPR 198, 200 (October 26, 1999). Petitioner has introduced no expert testimony whatsoever to counter the Department's and the Applicant's expert determinations that no flooding would occur or a causal connection between Applicant's property and any injury to Petitioner's property. As discussed above, Petitioner's testimony cannot be accepted as competent or credible because she has neither demonstrated any appropriate factual foundation for her testimony, nor has she demonstrated sufficient expertise. Petitioner has failed to carry her burden of proof to show that Applicant's project would cause an increase in flooding or flooding damage to her property. An appeal may be dismissed for failure to sustain a case, and an appeal may be dismissed upon jurisdictional grounds where direct testimony fails to support claims of aggrievement. *Matter of Stephen Miers*, Docket Nos. 2002-001, 2002-002, Recommended Final Decision (February 16, 2006); *Matter of Gallagher Group*, Docket No. 2003-019, Recommended Final Decision (May 2, 2005); *Cf., Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, at 28-32 (2006) (Plaintiff must show aggrievement in context of Chapter 40B appeal even despite legal presumption of aggrievement to abutters in applicable law). Therefore, the Department's motion for a directed decision is warranted, and a directed decision should enter in favor of the Department and the Applicant.

## **V. Conclusion**

For all the reasons stated above, I recommend that this appeal be dismissed for lack of standing and failure to sustain a case.

**NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

*This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.*

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Laurel A. Mackay  
Presiding Officer

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